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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 972

CITIES SERVICE OIL COMPANY and FRANK BRONCHICK, T/A FRANK'S SERVICE STATION,

Petitioners,

against

THE CITY OF NEW YORK and THE NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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THE CITY OF NEW YORK AND THE NEW YORK CITY TRANSIT AUTHORITY,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners pray that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of the State of New York in the above-entitled case.

Opinions Below

The decision of the Special Referee who heard this case at Special Term of the New York State Supreme Court (R. 86-92) is unreported. The memorandum decision of the Supreme Court, Appellate Division, Second Department (R. 106) is reported at 5 App. Div. 2d 869, 172 N.Y.S. 2d 549. The decision of the Court of Appeals is reported in 5 N. Y. 2d 110. Each of these decisions is printed as an appendix to this petition.

Jurisdiction

The judgment sought to be reviewed was entered on December 12, 1958 by the Supreme Court of the State of New York, Kings County, on an order of the Court of Appeals dated November 20, 1958. On January 23, 1959 petitioners made a motion in the Court of Appeals for reargument of this case on its merits and that motion was filed in said Court on January 30, 1959. On March 5, 1959, the Court of Appeals denied petitioners' motion for reargument. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

Petitioners' suit is based on the claim that the respondents, in establishing bus stops in front of the driveway openings of petitioners' service station, had unlawfully invaded and impaired a property right owned and enjoyed by petitioners,—namely, their right to have access from the highway to their service station across the driveway openings in the curb abutting their premises. Petitioners' claim that respondents had unlawfully abridged and curtailed such property right in violation of the Fourteenth Amendment to the United States Constitution was timely raised in the court of first instance by the allegations of petitioners' complaint wherein it was claimed the respondents has unreasonably and excessively interfered with petitioners' right, as the owner and lessee, respectively, of property which abuts upon a highway, to have the means of access to said property kept unobstructed (R. 5-10). The question of whether respondents had unreasonably, arbitrarily and capriciously exercised their police power in violation of the Fourteenth Amendment, when they located and maintained the bus stops which caused the unlawful interference with petitioners' right of access and with the use and enjoyment of their property was raised by the first affirmative defense set out in the answer of the respondent, City of New York (R. 12-14), and the first affirmative defense in the answer of the respondent, New York City Transit Authority (R. 19-22).

The decision of the trial court held that the respondents' interference with and obstruction of petitioners' right of access was neither unlawful nor actionable and that the maintenance of the bus stops had been effected in the public interest pursuant to the power of the City to regulate traffic (R. 88, 90).

Petitioners' appeal to the Court of Appeals was taken as of right, without leave of Court, after unanimous affirmance in the Appellate Division, on the ground that its appeal presented a constitutional question arising from petitioners' claim of wrongful obstruction and interference with their property right of access from their premises to the abutting highway (App. A, p. 1). The Court of Appeals accepted such appeal and decided it with explicit reference to the constitutional question presented by petitioners (App. A, pp. 27-28). The opinion of the Court of Appeals likewise made an express disposition on the merits of petitioners' claim that their property right had been abridged without compensation and by means of an unlawful exercise of the police power (App. A, pp. 29-30).

A further question of whether petitioners were denied due process of law arises out of the trial court's finding of fact that the interference with petitioners' right of access was slight and unsubstantial, notwithstanding a stipulation made between the parties during trial whereby it was agreed that, for the purpose of decision, the damage resulting from respondents' interference with petitioners' right of access was to be deemed substantial. This stipulation was imposed by the trial court to accomplish its stated purpose to postpone the presentation of evidence in respect of damage until after the Court had determined whether petitioners would be entitled to injunctive relief against respondents under any circumstances (R. 44). Despite the stipulation and plaintiffs' forebearance, pursuant thereto, from offering proof of the damage resulting from the obstruction of the curb cut openings, the trial court found, contrary thereto, that the

interference with plaintiffs' right of access had been "slight indeed" and based its decision upon said finding. The Court of Appeals expressly affirmed the lower Court's finding to the effect that the interference with petitioners' right of access was "slight indeed" (App. A, p. 29), notwithstanding the fact that petitioners' brief before that court explicitly directed the Court's attention to the circumstance that the lower Court's finding contravened the court-imposed stipulation that the damage resulting to petitioners from the obstruction of access was to be deemed substantial, on the basis of which stipulation petitioners were induced to forebear from offering record proof of damage.

Questions Presented

1. Whether, in a case where the economic utilization of real property is premised upon vehicular access thereto, a municipality may lawfully authorize and create a direct and substantial interference with the means of access to said property from the abutting highway without compensation to the owner and lessee of said property.

2. Whether the establishment and maintenance of bus stops which obstruct, to a degree which results in substantial damage to the petitioners, the only means of access available to petitioners and the patrons of their service station is a reasonable exercise of the police power.

3. Whether petitioners were denied due process of law when the trial court made a finding of fact that the interference with petitioners' right of access was "slight indeed" in contravention of a stipulation to the effect that the damage resulting from respondents' interference with petitioners' right of access was substantial, which stipulation had been formulated by the Court and accepted by petitioners in lieu of their right to present proof of the substantial damage caused by respondents' impairment of their property right.

Statement of the Case

Petitioner, Cities Service Oil Company, was the owner, and petitioner, Bronchick, the lessee, of a parcel of real property located on the northwest corner of Flatbush Avenue and Kings Highway in Brooklyn, New York, which property had been occupied and used as a gasolene service station for over 20 years (R. 6, 29, 55). The sole means of vehicular access to petitioners' service station from the two highways on which it abuts is provided by four curb cuts, two of which provide access to the property from Flatbush Avenue and two from Kings Highway (R. 6). The Petitioners' curb cuts were in existence before the bus stops here complained of were established (R. 60).

The respondent, New York City Transit Authority, operates buses on both Flatbush Avenue and Kings Highway (R. 19-20). The Flatbush Avenue bus stop was established in 1951 when a trolley line was replaced by buses (R. 22, 87). Flatbush Avenue is the more heavily traveled of the two streets and is the principal and substantially more important access street to petitioners' premises (R. 49). Petitioners' Flatbush Avenue curb cuts are 30 feet and 30 feet six inches wide and are separated by a 38 foot width of unbroken curb space; the respondents' Flatbush Avenue bus stop is 82 feet in length and it spans all but nine feet of the two curb cuts which afford access from Flatbush Avenue to Petitioners' premises (R. 67-69, Dfts' Ex. B).[1] The petitioners' curb cuts on

[1] The measurements referred to herein are based upon a plan of bus stops, bus routes and access points to abutting property which was prepared by the respondent City's Traffic Department. (Dfts' Ex. B). Respondent Transit Authority also offered in evidence a similar plan on which the bus stops in front of petitioners' premises were designated to show the condition which exists when one bus is stopped on each side of the service station (Dfts' Ex. A). Photographic proof presented by petitioners, however, substantiates the fact that two buses utilize these bus stops at the same time and that when this occurs petitioners' curb cuts are obstructed as indicated in Defendants' Exhibit B (Pltfs' Exs. 1-4).

Kings Highway are 30 feet and 29 feet, 6 inches in width with a 55 foot width of unbroken curb between them and respondents' Kings Highway bus stop completely obstructs both of these curb cuts (Dfts' Ex. B; R. 29). This bus stop, moreover, is the terminal point of respondents' Kings Highway bus line and, consequently, the buses remain for some time at this frontage of petitioners' service station until they make their turn to proceed from the north side of Kings Highway to the eastbound terminal of the bus line which is located on the south side of the intersection (Dfts' Exs. A, B). The length of a bus is 40 feet so that when one bus is stopped at the Flatbush Avenue bus stop in front of petitioners' premises, it fully obstructs one of the two curb openings by which access is had to the premises (R. 29, 46-47). During the morning and evening rush hours, which are the hours of maximum business opportunity at the petitioners' service station, the Flatbush Avenue buses operate on a headway of 80 seconds between each bus (R. 36, 46). For at least 50% of the time during the hours when the buses run on this short headway, both of the petitioners' Flatbush Avenue curb cuts are completely blocked because there are two or more buses standing in the bus stop on Flatbush Avenue. At least one of the Flatbush Avenue curb cuts is continually blocked throughout these hours, inasmuch as there is always at least one bus standing in the bus stop (R. 46, 47, 37, 52).

Prior to petitioner Bronchick's tenancy, the service station was operated by the same tenant-dealer of Cities Service Oil Company for more than 21 years up to the year 1956 (R. 55). By 1950, the last full year of operation prior to the establishment of the Flatbush Avenue bus stop, this station, which then had obsolescent facilities, sold an annual volume of over 191,000 gallons of gasolene, and this gallonage volume had been steadily increasing since 1947 (Pltfs' Ex. 8). After 1951, when the bus stop was established, the annual sales volume at the station steadily declined and this decline continued until 1954

when petitioner, Cities Service Oil Company, undertook to modernize the station by completely reconstructing the facilities at the property (Pltfs' Ex. 8; R. 39). Although there was an increase in the volume of business done at the station after its modernization and reconstruction were completed in 1955, its total annual gallonage did not reach the 191,000 gallon level achieved in 1950, despite the large investment made in modernizing the service station and despite the fact that there has been a steady increase in annual automobile ownership registration figures throughout the United States (Pltfs' Ex. 8). In 1956, the tenant-dealer who had occupied this property for over 20 years surrendered his lease to petitioner, Cities Service Oil Company, because of the unfavorable economic situation created by the location of respondents' bus stops (R. 57).

In October 1956, petitioners commenced an action in the Supreme Court of the State of New York, Kings County, to obtain an injunction restraining the respondents from maintaining the two bus stops which were obstructing the curb cuts leading to petitioners' service station property on the grounds that the continued maintenance of said bus stops constituted a substantial interference with petitioners' right of access to the highway on which their property abuts and that this interference imposed an unreasonable and unlawful limitation upon petitioners' use and enjoyment of their property and of their right of access thereto from the public highway (R. 4-10). Respondents contended that the two bus stops had been established pursuant to the power of the respondent, City of New York, to regulate traffic and that the establishment of these bus stops by respondents' Police Commissioner and the subsequent refusal of respondents' Traffic Commissioner to relocate them was a reasonable exercise of the police power (R. 12-14, 19, 23-24).

During the trial of this action, petitioners presented evidence which established the facts hereinbefore set forth

with respect to the degree of obstruction which was caused by the stoppage of respondents' buses in the curb cuts on both sides of petitioners' service station (R. 44-58). Petitioners offered written proof that the Prudential Savings Bank, occupying the southwest corner of Flatbush Avenue and Kings Highway immediately across Kings Highway from petitioners' premises, would be at advantage if the two bus stops were located in front of the bank, and, in fact, solicited such location of the stops (Pltfs' Ex. 5). Petitioners also offered to establish the extent of the damage that they had sustained by reason of respondents' interference with their right of access (R. 41-42, 44). The trial court, however, ruled that the presentation of such evidence should be deferred pending its determination of whether petitioners were entitled to injunctive relief under any circumstances (R. 44, 84). Petitioners contended that the absence of proof in respect of the injury which they had sustained as a result of respondents' interference with their right of access to their property would be prejudicial to the determination of their underlying right to injunctive relief, particularly if they were compelled to take an appeal on a record from which proof of such substantial damage had been excluded (R. 41, 84, 90-91). Despite this argument, the Court adhered to its original ruling; however, it approved and, in fact, brought about, a stipulation between the parties whereby it was agreed that the Court would assume, for the purpose of its ruling on petitioners' underlying right to an injunction, that they had sustained substantial damage by reason of respondents' interference with their right of access (R. 84-85, 90-92).

The only witness called on behalf of the respondents was the Traffic Commissioner of the City of New York. He testified that the bus stops which obstruct the sole means of access to petitioners' property had been established and were being maintained in their present location

for the primary purpose of permitting passengers to transfer from one intersecting bus line to the other without crossing either Flatbush Avenue or Kings Highway (R. 62). During his cross examination, however, the Commissioner admitted that if the westbound terminal stop of the Kings Highway bus were discontinued and the passengers who now alight on petitioners' Kings Highway curb cuts were discharged at the bus stop which is already established on the south side of Kings Highway, the Flatbush Avenue bus stop could be relocated on the southwest corner of the intersection and passengers could, as they now do, transfer between the two bus lines without crossing either major thoroughfare (R. 69-70). In addition, the Commissioner admitted that the relocation of the bus stops which interfere with and obstruct petitioners' right of access would eliminate the safety hazards which are involved in discharging passengers on the slanting surfaces of petitioners' curb cuts and in requiring passengers to wait for buses in the driveways through which vehicles are attempting to enter and leave petitioners' service station (R. 77-78, 80) and in the traversing by passengers of the interior work area of the service station in order to "shortcut" the distance to be walked in transferring from one bus to the other.

Cross examination of the Commissioner further corroborated the proof introduced by petitioners in respect of the degree to which respondents' buses obstruct the means of access to and from petitioners' property. The Commissioner testified that whenever two buses occupied the bus stops in front of petitioners' Flatbush Avenue curb cuts there would be no more than nine feet of driveway through which vehicles could enter and leave the premises and that this opening was insufficient to permit traffic in the lane nearest petitioners' property to obtain access thereto (R. 68-69; Dfts' Ex. B). He admitted, moreover, that the nine-foot opening would only be available when buses made the most economical use of the space and that if they main-

tained a ten-foot clearance between buses, the curb cuts would be completely obstructed (R. 69). This witness also testified that access to abutting property was a factor to be taken into account when bus stops were established and that traffic regulations promulgated by himself expressed a policy of keeping public and private driveways free from obstructions by parked, stopped or standing vehicles (R. 71-73, 79). In spite of this testimony, and notwithstanding his concession that the primary objective of permitting passengers to transfer between the intersecting lines without crossing the highway would be as fully satisfied by relocating both bus stops on the southwest corner of the intersection as by maintaining them in their present location, the Commissioner testified that he would maintain his objection to the proposed relocation and this notwithstanding the proof that the abutter in proposed location would derive advantage from the bus stops as compared with the substantial disadvantage suffered by petitioners. He insisted that the relocation would be undesirable because it would require the City to move six parking meters which are presently in front of the bank and because it would result in having both the northbound Flatbush Avenue bus stop and the southbound stop on the same side of the intersection (R. 63). Although no reasons were given for his conclusion, the Commissioner testified that an undesirable traffic pattern always results from the location of the two bus stops on the same side of an intersection (R. 63, 75). The record indicates, however, that there is no uniform pattern established for locating bus stops in New York City—they may be located on the same or opposite sides of an intersection or in the middle of a block (R. 42-43).

On March 20, 1957, the trial court handed down an oral decision in which it dismissed petitioners' complaint on the ground that petitioners' right of access to and from their premises was subject to the public right to use the highway and that the bus stops in question had been established by

the respondent, City of New York, in the reasonable exercise of its governmental powers. Despite the stipulation whereby the parties agreed that the Court should assume that petitioners had sustained substantial damage by reason of respondents' interference with their right of access, the trial court based its decision upon a finding of fact that the interference with petitioners' right of ingress and egress was "slight indeed". Petitioners appealed to the Appellate Division of the Supreme Court, State of New York, Second Department, and that Court unanimously affirmed the judgment below without expressing any opinion on the substantial constitutional questions raised by the record in this case. Thereafter, petitioners appealed to the Court of Appeals of the State of New York on constitutional grounds. That Court unanimously affirmed the judgment of the Appellate Division and of the trial court.

Reasons for Granting the Writ

1. In substance, the New York Court of Appeals has upheld the power of the respondents, in order to provide a transit line with facilities to receive and discharge passengers, to authorize, create and maintain a direct and substantial interference with the petitioners' rights, as the owner and occupant of property which abuts on a highway and which depends exclusively on highway access for its economic utilization to have access to their property in furtherance of the business use thereof. In so holding, the State Court has disregarded its own decisions which clearly establish that an abutting owner's right of access to his premises is property which may not be impaired or destroyed without compensating the owner for his loss. Inasmuch as the Court of Appeals has not expressly modified or overruled the prior holdings in which it established that access to abutting property was a right inuring in the owner thereof by virtue of his ownership, its holding in this case is, at the very outset, in direct

conflict with the holding of this Court in *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544 (1904). In the *Muhlker* case, this Court reversed a decision of the Court of Appeals of New York because in disregard of its own earlier decisions it had denied compensation to an abutting owner whose rights of light, air and access had been abridged by reason of the construction and operation of an elevated railroad. The *Muhlker* case emphasized the obligation of a state court to enforce and protect the property rights established by its own decisions and held that a failure to do so was a deprivation of property which violated the due process clause of the Fourteenth Amendment. This same principle was reaffirmed without qualification in *Sauer* v. *City of New York*, 206 U. S. 536 (1906) except that there, the Court, over a strong dissent by Justice McKenna, held on the facts adduced, that the right asserted by petitioner was not a property right.

There can be no doubt that the New York Court of Appeals has held that access to abutting property from the adjacent highway is a property right and that an abutting owner may not be deprived of such access by the operation of a municipal ordinance which purports to designate a portion of the highway as a place where vehicles for public hire may stand or stop to receive and discharge passengers. In *Waldorf Astoria Hotel Company* v. *The City of New York*, 212 N. Y. 97 (1914), the Court considered the validity of an ordinance which established an area of the highway immediately adjacent to plaintiff's hotel premises as a public hackstand at which taxicabs could wait for fares. There the Court held that any substantial interference with an abutter's right of access was unlawful and that abutter's convenience as demonstrated by past experience was the criterion by by which the courts were to determine whether the interference resulting from the enforcement of the ordinance was substantial. Although the Court dismissed the complaint in the *Waldorf* case because there was no proof

that a 30 foot space required by the ordinance to be left vacant in front of plaintiff's hotel for purposes of ingress and egress thereto was inadequate or unreasonable in relation to the plaintiff's needs or convenience, there is still no question but that New York law, as enunciated in the *Waldorf* case, precludes the enforcement of municipal ordinances or regulations which will allow the parking, stopping or standing of vehicles in places where such parking, stopping or standing will result in the substantial obstruction of an abutting owner's right of access to his property. In fact, the present general legislative policy of New York State, which is not specifically applicable to New York City because of home rule privileges accorded to that municipality, expressly prohibits the obstruction of public and private driveways by parked, stopped and standing vehicles N. Y. Vehicle and Traffic Law Sec. 1202 (L. 1958 c. 853 eff. July 1, 1958).

Moreover, by adopting the standard of the abutter's convenience, the *Waldorf* case unquestionably established that the use to which abutting property is devoted determines the degree of access which must be preserved free from interference and obstruction in order to safeguard an abutter's right to the reasonable enjoyment of his property. In the instant case, since petitioners operate a gasolene service station, there must be no interference with ingress and egress to and from the property which prevents the patrons of the station from readily and easily entering and departing in their vehicles. Under these circumstances, it is submitted that when respondents establish bus stops at petitioners' curb cuts and then operate buses on a headway so short that the principal avenues of ingress and egress to petitioners' service station are completely obstructed during at least half of the period of petitioners' greatest business activity, they have created a substantial unlawful interference with petitioners' property right of access as said right is established and defined in the *Waldorf* case. By ignoring the

rule thus established by its own prior holding, the Court of Appeals disregarded this Court's holding in *Muhlker v. Harlem Railroad Co.*, 197 U. S. 544, *supra*, which clearly requires the New York Courts to enjoin the continued maintenance of respondents' bus stops in front of petitioners' property.

Even if the decision of the Court of Appeals in this case is to be regarded as a modification of the rule of property established in *Waldorf*, there would still exist the grave question of whether that Court was empowered to limit an acknowledged property right and, thereby, to deny petitioners' rights under the Federal Constitution, *Muhlker v. Harlem Railroad Co., supra*. In the *Muhlker* case, this Court expressly held that the power of state courts to modify or change their own decisions may not be exercised to take away rights which had come under the protection of the United States Constitution. It seems clear, therefore, that no matter how the instant decision is construed, it has deprived petitioners of their constitutional right to maintain their property right of access unimpaired by either public or private interference and is therefore in derogation of the rule established in *Muhlker v. Harlem Railroad Co.*, 197 U. S. 544, *supra*.

The decision below in the case at bar is also in direct conflict with the holding of this Court in *Donovan v. Pennsylvania Company*, 199 U. S. 279 (1905) in which the right of an abutter to have access to his premises from the adjacent highway was expressly recognized as property which is entitled to constitutional protection against interference by governmental or private action. In that case, this Court affirmed a decree which enjoined licensed hackmen from congregating with their vehicles in the street outside of a railroad station in a manner which interfered with the ingress and egress of passengers to and from said station. In so holding, the Court said:

> "Of course, any use of the sidewalk in whatever way that would unnecessarily or unduly obstruct and inter-

fere with passengers in their going or coming would be inconsistent with the rights of such passengers as well as an infringement of the right of a company as abutting property owner to have by its agents and employes, for the purposes of its business, reasonable access to and from the sidewalk and the public street".

The *Donovan* case is similar to the *Waldorf* case in that the hackmen who were interfering with the company's right of access to its depot relied on a municipal ordinance which permitted cabs to stand at railroad depots ten minutes previous to the arrival of all passenger trains. Although the Court noted that this ordinance had been sustained as valid by the state courts, it nevertheless took the position that the ordinance did not justify an unlawful and unreasonable interference with the abutting owner's right of access. The clear import of the *Donovan* case, therefore, is that a municipal ordinance which substantially interferes with an abutting owner's right of access constitutes an interference with a fundamental property right, which interference may and should be enjoined by the Courts.

2. In holding that the petitioners were not entitled to any relief in this case because respondents' interference with their right of access was slight and intermittent, the New York Courts have disregarded the decisions in which this Court has held that an intermittent and occasional interference with the use and enjoyment of private property constitutes an impairment of that property for which the owner must be compensated notwithstanding the fact that he is not ousted from possession. In addition, the instant decision has virtually made a dead letter of not only the *Waldorf* case but of every other decision throughout the United States in which the parking, stopping or standing of vehicles in the highway adjacent to the premises of an abutting owner pursuant to a municipal ordinance has been condemned as an unwarranted interference with

the abutter's right of free and ample ingress and egress to and from his property. There can be no question that any interference with access that is caused by the parking or standing of vehicles of any type will, in physical terms, be intermittent. It is therefore obvious that the substantiality of the injuries sustained by the abutting owner must be measured largely in terms of the economic consequences which he sustains by reason of the obstruction complained of. Thus, in *People ex rel. O'Reilly* v. *The City of New York*, 59 How Prac. (N. Y.) 227 (1886) the New York Court of Appeals upheld the right of a physician to obtain an injunction against the parking of market vehicles in the street on which his home abutted, although the market vehicles which created the obstruction were present only for six hours during one evening a week and came and went intermittently during that period. Similar results were reached in Ohio when a taxi cab stand obstructed the entrances of a hotel, *Branahan* v. *City of Cincinatti*, 39 Ohio State 333 (1883) and in Missouri and New Jersey when market vehicles obstructed a wholesale market and a private dwelling, *Schopp* v. *City of St. Louis*, 117 Mo. 131, 22 S. W. 898 (1893); *McDonald* v. *City of Newark*, 42 N. J. Eq. 136, 7 Atl. 863 (1886). In *United States* v. *Causby*, 328 U. S. 256 (1946) this Court upheld the claim of a farmer who had been forced to discontinue using his property to raise chickens because flights of military aircraft at low altitudes over his farm had so frightened the birds that they flew against the walls of their enclosures and were killed. In that case, the flights of aircraft which were responsible for the destruction of plaintiff's poultry business were intermittent to the extent of constituting less then ten percent of those which departed from and arrived at the adjacent airport.

It is submitted that the foregoing cases give cogency to the view that an interference by governmental authority with a property right cannot be justified on the grounds of intermittency when the facts of the particular situation

clearly establish that the value of the property in question has suffered a substantial economic impairment by reason of such interference. As was said by Mr. Justice Douglas in the *Causby* case, 328 U. S. 256, 262:

> "There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain, but the use of the air space immediately about the land would limit the utility of the land and cause a diminution in its value."

See also *United States* v. *Cress*, 243 U. S. 316 (1916), wherein this Court held that the erection of a dam which caused respondent's property to be intermittently flooded was an impairment of property rights which violated the due process clause of the Constitution.

Closely associated with the concept of intermittency in the opinion below is the rationalization that petitioners are not entitled to relief because the right of the public to use the streets for purposes of travel is a "primary" right to which the rights of the abutter must be subservient. Although the present case is not concerned with the relative primacy of the public right to use the street as against the right of the abutter to have free and ample access thereto, but rather with the power of a municipality to authorize the maintenance of a direct interference with an abutter's sole means of access to his property, we believe it appropriate to expose the error of this shibboleth at the outset. In *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544, *supra*, this Court criticized the New York Courts for their attempt to assign relative degrees of importance to the various public and private rights which are involved

in the use of the streets when it held (p. 571):

> "We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain eminance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the elevated railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91c, and, it is there said, 'established beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves.'"

The opinion of the Court of Appeals cites *Sauer* v. *City of New York*, 180 N. Y. 37, aff'd 206 U. S. 536 (1904), for the very proposition which this Court rejected in *Muhlker*. That Court further stated that *Fobes* v. *Rome, Watertown, Ogdensburg R. Co.*, 121 N. Y. 505 (1890) and the other street railroad cases are not without relevance to the issues herein raised. Close analysis of *Sauer* v. *City of New York*, however, reveals that it had nothing whatever to do with an abutters' right of access.[2] In that case, the respondent erected an elevated highway above the street

[2] It is also significant to note that the other street use cases cited by the Court of Appeals to support its decision herein involved the validity of regulations which were intended to control either the direction of moving traffic, *Jones Beach Boulevard Estates* v. *Moses*, 268 N. Y. 362 (1935), or the use of the streets by an abutting owner for a non-street purpose, *Deshong* v. *City of New York*, 176 N. Y. 475 (1903), and that, like the *Sauer* case, they are unconcerned with the problem of an abutter's right of access.

on which petitioners' property abutted but did not alter the grade of the street adjacent to his premises. The improvement complained of, therefore, merely created a new elevated street above the original street but did not preclude those who traveled upon the original street from freely entering and leaving petitioners' property. In the *Fobes* case, petitioner brought an action to enjoin defendant from maintaining a street railway in the highway adjacent to his premises and claimed that any diminution of his easement of light, air and access by reason of the railroad's operation was actionable. It should be noted that the opinion in *Fobes* does not discuss any facts which tend to establish the alleged damage to plaintiff and that counsel for defendant argued that "there is no evidence that the railroad in front of plaintiff's premises is so constructed as to unreasonably or unnecessarily interfere with access to plaintiff's premises or with the use of the street as a street for street purposes." 121 N. Y. 505, 509. In addition, counsel's argument in that case expressly concedes that plaintiff would be entitled to recover damages which directly flow from interference with access (*ibid.* p. 508). Finally, the opinion of the court itself recognized that plaintiff would have a cause of action for the defendant's excessive use of the street if such use amounted to a nuisance (p. 521).

In brief, the *Fobes* case and the other Street Railway cases are authority only for the proposition that a street car line is a proper street use which in itself creates no cause of action in favor of an abutter. They do not, however, authorize a municipality to directly obstruct an abutter's right of access by creating a stopping place for transit vehicles at the only place at which the abutter and his patrons may gain ingress and egress to the property.

This reliance on *Fobes* and *Sauer* by the Court of Appeals demonstrates its failure to evaluate petitioners'

right of access in light of the present day realities under which their business is conducted. It is common knowledge that street railroads and trolley car lines are customarily operated in the middle of the highway and that an unobstructed lane of traffic is maintained on each side of the tracks so that other vehicles may travel on the street and abutting premises may be freely entered. In modern times, however, New York City has abandoned the trolley line in favor of buses which stop to receive and discharge discharge passengers at the curb immediately adjacent to the abutting property. Under these circumstances, decisions which, as a matter of fact, found no injury to the right of access of an abutting owner arising from the operation of a street railway located in the center of the highway are inapplicable to the case of bus lines which have their stopping places at the curb immediately adjacent to abutting premises.

Today, the street and elevated railroads are virtually extinct and have been replaced by the motor bus, the motor truck and the passenger car as a means of transportation in and between our cities. In order to serve the great numbers of people whose everyday mode of living is inseparably bound to vehicular travel, the owners of property which abuts on the streets and highways have built service stations, motels, shopping centers, drive-in theatres and many other types of facilities predicated upon vehicular access. Business enterprises which have been longer known to the community, such as banks and restaurants, have also adapted their operations to meet the needs of the traveling public by establishing drive-in facilities which permit a customer to transact his business without leaving his automobile. Each of these modern developments in the use of abutting property requires a degree of access that permits vehicles to enter and leave easily and safely; none of them, therefore, could reasonably be expected to operate on a sound economic basis if their right of ingress and egress to and from the adjacent

highway must be judged according to the lesser quantum of access required by property owners who devote their holdings to uses which are in no way comparable to those enumerated herein. The correct rule is and should be as stated in the *Waldorf* case—an evaluation and recognition of the convenience of the abutting owner in relation to the nature and use of his property.

Apparently, the decision in this case was predicated upon the conclusion that petitioners' right to have the curb cuts leading to their service station premises kept unobstructed, although property, is property of a secondary or subordinate nature which may be summarily impaired with impunity by a municipal fiat. The above-quoted language of this Court, however, conclusively establishes that such a distinction is improper and that it may not be relied upon to justify the impairment of a constitutionally protected property right. It is self-evident that the complete denial of access to premises, even at the corner of Broadway and 42nd Street in New York City, would represent complete destruction of the economic value of such premises cf. *Lawler* v. *Creasy*, 160 F. Supp. 404 (W. D. Pa. 1958). It follows, a fortiori, that denial of access which is substantial, but less than complete and continuous, would represent substantial, albeit not total, destruction of the value of the abutting premises.

3. The trial court and the Court of Appeals have based their decision that the respondents may exercise the police power to regulate traffic to the detriment of petitioners' property right of access upon the erroneous finding that the interference caused by respondents' buses was slight and intermittent. Thus, the Referee who heard the case at Special Term cited this Court's decision in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110 for the proposition that "an ulterior public advantage may justify a comparatively insignificant taking of property for what in its immediate purpose is a private use" and the Court of

Appeals expressly held that "a regulation causing only minor and intermittent interference will not be stricken as invalid".

The finding of "slight" interference by the trial and appellate court is incomprehensible and unsupportable in the face of uncontroverted proof that the buses obstructed the Flatbush Avenue driveways at least 50% of the time during petitioners' maximum hours of business opportunity. The finding of "slight" interference in contravention of a stipulation that the damage was to be deemed substantial, which stipulation was imposed by the trial court for the purpose of establishing and regulating trial procedure, represents a denial of due process which should be reviewed and corrected by this Honorable Court.

Such denial of due process, it is submitted, stems from the fact that the finding of slight and intermittent interference is directly opposed to the stipulation whereby the parties hereto agreed that for purposes of deciding whether petitioners would be entitled to enjoin the interference complained of under any circumstance the courts below were to assume that the damage resulting from such interference was substantial. The record herein also shows that this stipulation was brought about by the trial court so that petitioners would not be prejudiced by his ruling pursuant to which they were required to postpone the presentation of their proof concerning the damage which they had sustained by reason of the obstruction of their curb cuts. In short, the function of the stipulation was to conclusively determine the substantiality of the injury sustained for the purposes of this case, because such proof was a vital factor in determining whether the petitioners had been subjected to a substantial interference within the rule of the *Waldorf* case. Indeed, logic compels us to conclude that when the *Waldorf* case established the standard, that is, what past experience in the operation of a particular parcel of abutting property has demon-

strated to be convenient to provide free and ample access thereto, it made the degree of economic damage that results from an interference with an abutter's right of access an essential element of the injured party's right to relief. The failure of the lower courts to recognize and enforce the stipulation herein completely deprived the petitioners of an opportunity to establish this aspect of their claim.

Under well-settled law, the stipulation which petitioners were virtually compelled to accept conclusively resolved the issue of the substantiality of the injury which they had sustained through the impairment of their right of access by respondents and a contrary finding was clearly unwarranted once the opportunity to present the proof that would be necessary to establish the stipulated fact had been relinquished in reliance upon the stipulation. In a case which was recently decided by this Court, the conclusive nature of a factual stipulation was expressly recognized, *Hotel Employees Union Local No. 255* v. *Sax Enterprises, Inc.*, 358 U. S. ——, L. Ed. 3 —— 2d 289 (1959). There it was held that a stipulation to the effect that a witness would testify to the fact that interstate commerce was involved in the Florida resort hotel industry and that judgment should be rendered in accordance with said stipulation made it unnecessary to remand the case for consideration of the question resolved by the stipulation. In the instant case, one of the issues presented for this Court's consideration is whether the New York Courts may disregard a stipulation which established an essential element of petitioners' claim and enter a judgment which is contrary in law and in fact to the terms of such stipulation. The constitutional aspects of the question thus presented are somewhat novel and have never to our knowledge been precisely ruled upon in this Court. Indeed, the approach to the stipulation which was taken by the lower courts in their respective opinions is in itself most unusual. The trial court made an express finding of slight interference

which contradicted the stipulation and the Court of Appeals reaffirmed that finding, while neither opinion even so much as acknowledged that any such stipulation had been formulated.[3]

The importance of the right which was thus abridged cannot be overemphasized. It is the unquestioned prerogative of every litigant to be given an opportunity to present all the relevant and material evidence at his command in order to establish the validity of his claim or defense. By the same token, however, the courts have approved and encouraged the practice of stipulating facts in order to promote the expeditious administration of justice. So that a party will not be prejudiced in a substantial right by withholding the presentation of proof on the faith of a stipulation, it has long been recognized that the trier of the fact must be bound by the stipulation and that the judgment entered in a given case must be rendered in accordance with the facts as stated therein. The instant decision marks a radical departure from this salutary rule and demonstrates the existence of a substantial constitutional issue, heretofore undecided, with regard to the power of a court to disregard and, indeed, to find to the contrary of a stipulation made during trial at the court's very instance, when a party, in reliance on the stipulation, forbears from offering record proof of the fact admitted thereby.

4. The issues in the instant case raise broad and substantial questions of constitutional law which profoundly

[3] However, in colloquy with counsel subsequent to the reading of his opinion, the trial court stated that its ruling would be the same regardless of the amount of damage shown (R. 91). It should also be noted that this statement was made after petitioners' counsel had taken exception to the decision as originally rendered and had requested leave to introduce proof of the damage resulting from respondents' interference (R. 90-91), which request was responded to by the trial court with a reiteration of the stipulation that it would be assumed that petitioners had sustained substantial damage by reason of the interference with access (R. 91-92).

affect the rights of property owners throughout the United States, and transcend the immediate private issue of whether respondents may maintain the bus stops which are interfering with the petitioners' right of access. In 1929, when gasolene service stations were a relatively new and undeveloped type of retail business, their were approximately 121,000 such facilities in the United States. By 1954, according to the United States Statistical abstract for 1958, this number had increased to 181,747 stations. There also exist today a myriad of other businesses, predicated on vehicular access from the highway, which were virtually non-existent short years ago. It is of outstanding importance to the owners of all such facilities that there be a determination by this Court to lay at rest the unsettling principle which has been laid down by the Court of Appeals,—namely, that an existing business enterprise which draws its sole patronage from vehicles entering the premises from the abutting highway is without reinedy if there is substantial governmental obstruction of such access.

Also of profound general, rather than private importance, is the question of protection of the rights of a litigant in a case where there has been disregard by the trier of the fact, and the appellate courts, of a stipulation of fact, and the entry of a decision and opinion which are predicated upon a finding of facts to the contrary of the facts stipulated.

Respectfully submitted,

GEORGE H. COLIN,
Counsel for Petitioners.

WILLIAM N. MAIRS, JR.,
of Counsel.

New York, N. Y., June / , 1959.

APPENDIX A

Opinion of the Court of Appeals

Fuld, J.:

Claiming that their right of access to their gasoline station has been unlawfully invaded and that such invasion constitutes a taking of property without due process of law, Cities Service Oil Company and Frank Bronchick, the owner and lessee, respectively, of the premises, seek injunctive relief and damages—an injunction to restrain the City of New York and the New York City Transit Authority from maintaining bus stops on the two streets upon which their property abuts, damages for losses assertedly caused by the interference with their business. The Court at Special Term dismissed the complaint and the Appellate Division unanimously affirmed the resulting judgment. The appeal is taken to this court as of right on asserted constitutional grounds.

The plaintiffs' gasoline station is located in Brooklyn, at the northwest corner of the intersection formed by two busy thoroughfares, Flatbush Avenue and Kings Highway. On each side of the property fronting these streets, there are a pair of curb cuts installed and maintained pursuant to permits issued by the city (Administrative Code of City of New York, Sec. C26-228.0); the cuts are each 30 feet long, almost 40 feet apart on Flatbush Avenue and about 55 feet apart on Kings Highway. City-owned buses, running south on Flatbush Avenue and west on Kings Highway, stop to discharge and take on passengers directly in front of the plaintiffs' premises. The bus stop on Kings Highway has established more than 25 years ago, while that on Flatbush Avenue was established in 1951, when bus service was substituted for streetcar service.

The traffic light at the intersection is operated alternately on both sides on a 60-second cycle. On Flatbush Avenue, where, the plaintiffs allege, the interference with

ingress and egress is greatest, most of the morning traffic is northbound so that there are at that time very few passengers embarking and alighting at the bus stop in front of the plaintiffs' station. However, because of the short headway between the buses—80 seconds during the morning rush hours and two minutes during the afternoon and evening rush hours—when the light is red to southbound traffic, two southbound buses may be standing in front of the plaintiffs' premises at the same time.

According to the City Commissioner of Traffic, to whom is delegated the power of establishing bus stops (see New York City Charter, Sec. 1063), the two stops here in question were selected "to provide for the transfer of passengers between the two intersecting bus lines without requiring" passengers to traverse either of the busy crossings. He had given careful study to the problem, testified the commissioner, and, based on considerations of "public safety," "movement of traffic" and "access to property", it was his conclusion that the location of the two bus stops where they are is "the most practical and feasible location that can be devised". To the suggestion that the Flatbush Avenue stop be moved from where it is, on the northwest corner, to the opposite corner, the southwest one—near a bank which had no objection to a bus stop—the commissioner stated that such a shift would not only reduce the number of available parking spaces, but would result in the highly undesirable traffic pattern of two bus stops directly across from each other on Flatbush Avenue.

It is the plaintiffs' contention that their right of ingress and egress is a "paramount" property right and that the maintenance of the bus stops constitutes an unreasonable interference with that right. On the contrary, it is the right of the public to the use of the streets which is "absolute and paramount". (Deshong v. City of New York, 176 N. Y. 475, 483-484; see, also, Jones Beach Blvd. Estate

v. Moses, 268 N. Y. 362, 368; Sauer v. City of New York, 180 N. Y. 27, 31, affd. 206 U. S. 536.) To promote and facilitate travel on street and highway, a municipality may, therefore, in the exercise of an unquestioned governmental function, regulate and control traffic and public transportation. Unless arbitrary and capricious, such an act "will not be restrained nor will the courts assume the management and control of (the) highways" (Perlmutter v. Greene, 259 N. Y. 327, 334), for, as Special Referee Steinbrink aptly remarked at Special Term, any judicial interference with the expert judgment of those deputed to regulate traffic is likely to cause "confusion and disorder" in the administration of the traffic laws and result in "great inconvenience" to the public.

In view, then, of the community interest and concern in safe and unimpeded public travel, it follows, as we have already had occasion to write, that "The rights of an abutter are subject to the right of (a city) to regulate and control the public highways for the benefit of the traveling public. (Cases cited.) Although the abutting owner may be inconvenienced by a regulation; if it is reasonably adapted to benefit the traveling public, he has no remedy unless given one by some express statute. (Jones Beach Blvd. Estate v. Moses, supra, 268 N. Y. 362, 368.) A municipality may not, without paying just compensation, maintain an obstruction which bars an owner from access to his property (cf. Waldorf-Astoria Hotel Co. v. City of New York, 212 N. Y. 97, 103), but a regulation causing only minor and intermittent interference will not be stricken as invalid. In the Jones Beach case, for instance, where the regulation was upheld, the plaintiff's predecessor had sold a strip of land to the Long Island State Park Commission for use as a parkway connecting Jones Beach with Merrick Road, reserving land for driveways to permit him access to the proposed parkway. After the parkway

had been built, the commission so limited the use of left turns and u-turns that one entering the parkway from the plaintiff's property and desiring to travel northward was compelled to drive in the opposite, southerly, direction for five miles, until he reached Jones Beach, before he could turn to travel the way he wished to go. The burden placed on the plaintiff in that case was far more onerous than the inconvenience to which Cities Service and Bronchick are here subjected.

Not without relevance in this connection are the street railway cases in which abutting owners sought to enjoin the construction of streetcar lines as an interference with "light, air and access". (See Kane v. New York El. R.R. Co., 125 N. Y. 164, 176; Fobes v. Rome, Watertown & Ogdensburg R.R. Co., 121 N. Y. 505.) The Kane case involved an elevated railroad, as to which different rules applied, but the court, addressing itself to street railways, declared that the use of a city street for a railway, unless it practically closes the street, is a street use which may be permitted" and abutting owners "have no legal redress • • • although (the use) interferes with the enjoyment of their premises or seriously impairs their value" (125 N. Y., at p. 176).

The regulation placing the bus stops in front of the plaintiffs' premises was fully warranted to assure not alone the safety of the traveling public, but the orderly movement of pedestrian and vehicular traffic. Moreover, as found below, what interference of access there may have been, is "slight indeed," and it is enough to observe that the record amply supports that conclusion—establishing as it does that, even when two buses pulled to a stop on Flatbush Avenue at the same time and in back of each other, they remained but for "a few seconds," and that even during that period motor vehicles were able to enter the gasoline station by way of the northernmost curb cut.

Appendix A

It is self-evident, from what we have already said, that there is no basis for the plaintiffs' claim that their property has been taken without due process of law. (See, e.g., Sauer v. City of New York, supra, 180 N. Y. 27, 32-33, affd. 206 U. S. 536; Matter of City of New York (Brooklyn-Queens Highway), 300 N. Y. 265, 268-269; 2 Cooley, Constitutional Limitations (8th ed., 1927), p. 1149 et seq.; "The Constitution of the United States, analysis and Interpretation", Legis. Reference Service Library of Congress, Edward S. Corwin, editor (1953, U. S. Senate Doc. No. 170, 82d Cong., 2d Sess.), pp. 1067-1068.) In the Sauer case (supra, 180 N. Y. 27, affd. 206 U. S. 536), for instance, the court, after pointing out that "private property shall not be taken for public use without just compensation", went on to state (180 N. Y., at pp. 32-33):

> "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation * * * or give him any right of action."

The establishment of bus stops is indisputably performed in the proper exercise of governmental powers and may neither be regarded as a "taking" nor serve as a predicate for a cause of action. Any loss resulting from the interference with an abutting owner's enjoyment of his property is damnum absque injuria, and the owner must bear it. Traffic regulations, promulgated as they are to promote the safety and welfare of the traveling public, may not infrequently entail hardships and difficulties for some individual property owners. But that will furnish no ground for invalidating the regulation, for we deem it fundamental that, in this area of governmental action,

what is best for the body politic in the long run must prevail over the interests of particular parties. (See, e.g., Shepard v. Village of Skaneateles, 300 N. Y. 115, 118.) The interference here complained of must be shouldered by the plaintiffs as one of the inconveniences to be borne by the individual for the larger benefit of the community and the public in general.

The judgment of the Appellate Division should be affirmed, without costs.

APPENDIX B

Decision of Appellate Division

In an action by the owner and the lessee of a gasoline service station to enjoin the City of New York and the New York City Transit Authority from locating and maintaining certain bus stops and turn-around or terminal points on the frontages of said gasoline service station, the appeal is from a judgment entered after trial before a special referee, dismissing the complaint. Judgment unanimously affirmed, without costs. No opinion.

APPENDIX C

Oral Decision of Judge Steinbrink

Brooklyn, N. Y., March 20, 1957.

The Referee: Both sides have already moved for judgment and waive the making of formal findings of fact and conclusions of law, and the decision of the Court under Section 440 of the Civil Practice Act will constitute the findings.

This is an action to restrain and enjoin the defendants from locating and maintaining bus stops in the public streets on which plaintiffs' property fronts and from scheduling or permitting the stoppage of buses at such stops and for damages.

Plaintiff Cities Service Oil Company is the owner and plaintiff Bronchick the tenant in possession of the gas station on the northwesterly corner of Flatbush Avenue and Kings Highway in Brooklyn (Plaintiffs' Exhibit 3).

Plaintiff Cities Service Oil Company is and has been for many years the owner of the plot in question. Plaintiff Bronchick became its tenant in March of 1956. The gas station was modernized and enlarged in 1955.

Defendants are The City of New York and The New York City Transit Authority. The City of New York, by it's Department of Traffic, acting through the Commissioner of Traffic, under authority of Chapter 46, Section 1063 of the New York City Charter, established the bus stops in question. The co-defendant operates the transit facilities leased to it by the City of New York including the bus route B-41 on Flatbush Avenue and bus route B-7 on Kings Highway which are here involved (Defendants' Exhibit B). The Transit Authority is a public benefit corporation existing by virtue of Title 15, Article 7 of the

Appendix C

Oral Decision of Judge Steinbrink

Public Authorities Law. Bus route B-7 (Kings Highway-Saratoga Avenue) was established by Brooklyn Bus Corporation under franchise dated June 4, 1931, and amended April 30, 1936. Service commenced August 10, 1931. The bus stop on the Kings Highway side was established August 27, 1931. Bus route B-41 (Flatbush Avenue) was established upon the removal of the trolley line in March of 1951.

The curb cuts in front of plaintiffs' property have been there since 1925, although their location was slightly altered in 1954. The buses in question are each 40 feet in length.

The basic question in this case is whether, considering the end in view, the provisions of the New York City Charter and Administrative Code (and the actions of the defendants) pass the bounds of reason and assume the character of a merely arbitrary fiat.

The City streets are held by the City for the use and benefit of all the public. They are acquired and held in trust for use of all the people. For ordinary and general transportation and traffic they are free and common to all citizens (*Peterson* v. *City of N. Y.*, 260 N. Y. 156, 157).

Plaintiffs in this case do not own the highway. True they had a permit for the curb cuts, but this is nothing more than a tacit understanding for an appropriation of the edge of the roadway subject to the public uses of the street. The whole street is open to traffic and there has been no impassable barrier erected surrounding plaintiffs' property. It is clear that the convenience of thousands of people using the buses has been considered and that convenience is enhanced by the bus stops complained of.

Appendix C

Oral Decision of Judge Steinbrink

The cuts in the curb, even though made pursuant to a permit (Plaintiffs' Exhibit 6) which is revocable, did not create such an irrevocable easement as to preclude what has happened here and continued for five years, ever since the trolley lines were abandoned on Flatbush Avenue in favor of buses. Whatever rights plaintiffs have are subject to the fullest exercises of the primary right of the public as a whole. The change along the border of the streets by the establishment and maintenance of bus stops is for the benefit of public travel and is a matter of public right as against the right which plaintiffs claim. What interference of access there may be to the premises of the plaintiffs seems to me slight indeed for the buses do not remain at the curb cuts for more than a very short period. The traffic lights for Flatbush Avenue north and south and for Kings Highway east and west are on a sixty-second cycle. In any event the rights of an abutter of property on the public highway are subject to the rights of the state to regulate and control the public highways for the benefit of the traveling public. Although the abutting owner may be inconvenienced by a regulation, if it is reasonably adapted to benefit the traveling public, he has no remedy unless given one by some express statute (*Jones Beach Boulevard Estates, Inc.* v. *Moses*, 268 N. Y. 362, 368).

In the case of *Noble State Bank* v. *Haskell* (219 U. S. 104-110), the Court said:

> "In the first place it is established by a series of cases that an ulterior public advantage may justify a

comparatively insignificant taking of private property for what in its immediate purpose is a private use. (Citing cases.)"

Later, on an application for a rehearing, the Court clarified its earlier decision at page 580 and said that the cases which the Court had cited "were cited to establish not that property might be taken for a private use but that among the public uses for which it might be taken were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private."

When the case of *Hadacheck* v. *Los Angeles* was before the Court (239 U. S. 394, at p. 410), the Court, discussing the police power of a state, said:

"It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R.* v. *Tranbarger*, 238 U. S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."

To the same effect is *Perley* v. *N. Carolina* (249 U. S. 510, at 514), and cases there cited.

Appendix C

I, therefore, find that plaintiffs' rights are subject to the paramount right of the public in the use of the highways; that the defendant City of New York, in establishing the bus stops in question, was exercising a governmental function and that such action was not unreasonable, arbitrary or capricious; that for the Court to interfere might cause confusion and disorder in the administration of the traffic laws of The City of New York and in the proper operation of the bus lines in question and result in great inconvenience to the public.

Judgment for defendants dismissing the complaint on the merits. No costs.

FILE COPY

(35,826)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. 972

[illegible] SERVICE OIL COMPANY and FRANK BRONSTEIN
d/b/a FRANK'S SERVICE STATION

vs.

THE CITY OF NEW YORK and THE NEW YORK CITY
TRANSIT AUTHORITY

BRIEF OF THE RESPONDENT, THE CITY OF NEW YORK IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 972

CITIES SERVICE OIL COMPANY and FRANK BRONCHICK, T/A FRANK'S SERVICE STATION,

Petitioners,

against

THE CITY OF NEW YORK and THE NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

BRIEF OF THE RESPONDENT, THE CITY OF NEW YORK, IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI

The respondent, City of New York, for its statement in opposition to petitioner's application for a writ of certiorari, respectfully shows the following:

I. Statement of issue on application for a writ of certiorari to the Court of Appeals of the State of New York

The following is essentially the basic question which is here involved:

Does the respondent municipality's act in establishing bus stops on the public highways upon which the petitioners'

gasoline filling station premises abut, and the occasional and intermittent stopping of buses thereat in a fashion causing slight and intermittent interference with access to such gasoline filling station, assertedly resulting in loss of patronage, furnish the basis for a claim that there has been a taking of petitioners' property requiring compensation under the Fourteenth Amendment to the Constitution of the United States?

The petitioners' present claim of an unconstitutional deprivation of their property was not alleged in their complaint but was asserted for the first time on appeal to the Appellate Division of the New York Supreme Court (R. 5-10).

The New York Court of Appeals has held in this case that the petitioners' right of access to the abutting public highways is subject and subordinate to the rights of the public to travel thereover and that the respondents' acts in establishing and maintaining the bus stops do not result in a deprivation of property without due process of law (Petition, Appendix A, p. 26).

II. No substantial federal questions presented by the petition.

The nature and extent of the rights of a property owner to the abutting highway is a question of state law which this Court cannot review. *Sauer* v. *New York*, 206 U. S. 536, 548 (1907). This Court's holding in *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544 (1904), upon which petitioners rely [Petition p. 12], is not to the contrary. The basis for this Court's ruling in the *Muhlker case* was that the New York Court's judgment in that case was in conflict with the law of New York as previously pronounced in *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122 (1882) and therefore constituted an unlawful impairment of plaintiff's contractual rights. This is clearly shown by this Court's opinion in the *Sauer* case, *supra*, at pp. 549, 550.

The decision in this case is in accord with the decision in the *Sauer* case, *supra*, and with prior New York cases. Here, as in *Sauer*, the interference which resulted in the injury to the property owner's rights to the abutting highway resulted from a use of the highway for the sole benefit of the traveling public. Here, as there, the ruling of the state court was that such a use of the highway does not constitute an interference with the abutting property owner's rights which, as previously noted, are subject and subordinate to the rights of the traveling public. This holding was in full accord with all of the leading authorities on the subject. *Callanan et al.* v. *Gilman*, 107 N. Y. 360, 365 (1887); *Kane* v. *N. Y. E. R. R. Co.*, 125 N. Y. 164, 175-176 (1891); *Deshong* v. *City of New York*, 176 N. Y. 475, 483-484 (1903); *Sauer* v. *City of New York*, 180 N. Y. 27, 31 (1904), aff'd 206 U. S. 536 *supra*; *Jones Beach Blvd. Estate Inc.* v. *Moses*, 268 N. Y. 362, 368 (1935). The petitioners' claim that the New York courts ignored the holding in *Waldorf-Astoria Hotel Co.* v. *City of New York*, 212 N. Y. 97 (1914) [petition pp. 12-14] is without basis. To begin with, the actual holding of that case was that the local law there challenged was valid. That local law made provision for the establishment of public hack stands in front of various locations such as hotels, restaurants, etc., frequented by the public. The question directly presented was "whether such proposed use of the streets in front of private property involves an impairment of the easements of the abutting owner" (p. 101). In upholding the validity of that local law the New York Court of Appeals noted (p. 105) that an abutting owner's easement was impaired only in the case where "an absolute and permanent obstruction in a public street and involving the total and exclusive use of a portion thereof" was presented. The evidence most favorable to the petitioners here shows only an occasional and intermittent interference with access to the petitioners' premises. In this case the Court of Appeals clearly pointed out the distinction between a case of a permanent obstruction and one in which a minor and an inter-

mittent interference is involved (Petitioners' Appendix A, p. 28).

The question which petitioners seek to present as to whether their right of reasonable access to the abutting public highway under New York law was violated (Petition, p. 4) is patently a question of fact and not a question of law either state or federal. This would be so even if the record showed the claimed concession that petitioners sustained substantial damages from the maintenance and operation of the challenged bus stops (Petition, p. 3). The petitioners conceded that the City's Traffic Commission and the City established the subject bus stops by virtue of the power conferred upon them by the New York City Charter (Record 33). There can be no question that bus stops are a necessity if the public is to enjoy its paramount right under New York law to use the public highways for public travel, a right whose existence is not challenged. Statutes regulating or dealing with the movement of traffic on public highways constitute a valid exercise of the police power. *City of Buffalo* v. *Stevenson*, 207 N. Y. 258, 263 (1913). This Court has repeatedly ruled that damages resulting from the exercise of the police power do not constitute a taking of property within the meaning of the Fourteenth amendment of the Constitution of the United States. *Chicago Burlington &c. R'd* v. *Chicago*, 166 U. S. 226 (1897); *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453, 461 (1905).

In *Jamaica Water Supply Co.* v. *City of New York*, 346 U. S. 821 (1953), this Court denied certiorari to review the determination of the New York State court (304 N. Y. 917, affirming 280 App. Div. 834). The basis for the application of the Jamaica Water Supply Company to review the determination of the state court was that the acts of the City compelling the Jamaica Water Supply Company to relocate its mains in the street without the payment of compensation constituted a deprivation of property in violation of that company's rights under the Fourteenth Amendment.

We submit that the question presented by this application for certiorari has so repeatedly and uniformly been decided adversely to the petitioners' contention that no substantial question is presented by this application entitling the petitioners to invoke the jurisdiction of the Supreme Court of the United States.

CONCLUSION

The petition should be denied.

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